IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARC ADAM HALL,
Petitioner.

No. 2 CA-CR 2016-0247-PR
Filed October 12, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20102131001
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Marc Hall petitions for review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and its denial of his motion to reconsider that ruling. For the following reasons, we grant review, but we deny relief.

¶2 After a jury trial, Hall was convicted of three of ten counts of sexual exploitation of a minor for possessing three digital videos of child pornography. He was acquitted of seven counts of exploitation of a minor. This court affirmed his convictions and sentences on appeal. *State v. Hall*, No. 2 CA-CR 2013-0314, ¶ 38 (Ariz. App. June 3, 2014) (mem. decision).

¶3 In his petition for post-conviction relief, Hall alleged his trial counsel rendered ineffective assistance during plea negotiations and during trial. As summarized in his petition for review, Hall specifically alleged that counsel (1) provided "inadequate advice" during plea negotiations, causing him to reject a plea offer from the state; (2) exhibited poor performance during jury selection; (3) exhibited a lack of preparation at trial with respect to forensic computer evidence and by failing to "properly cross-examine witnesses," failing to request a limiting instruction regarding testimony about other images found on Hall's computer, and failing to object to "prosecutorial misconduct and vouching"; and (4) told Hall she had time to prepare for trial or time to prepare him to testify at trial, but not both, thereby "interfer[ing] in his ability to testify on his own behalf," resulting in his decision to forego that opportunity. Hall also maintained the combined effect of counsel's

alleged errors and omissions was prejudicial under the "cumulative error" doctrine.

¶4 In a detailed, ten-page ruling, the trial court summarily dismissed Hall's petition, finding he "failed to present a material issue of fact or law that would entitle him to an evidentiary hearing and failed to state a colorable claim for relief on any basis." *See* Ariz. R. Crim. P. 32.6(c). In Hall's petition for review, he argues the court erred by applying an "incorrect standard" to determine whether he had stated a colorable claim and, as a result, erroneously denied his request for an evidentiary hearing.

¶5 We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). A defendant is entitled to an evidentiary hearing only if he presents a colorable claim. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). Our supreme court has explained that "[t]he relevant inquiry" to determine whether a defendant has stated a colorable claim "is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence." *State v. Kolmann*, 239 Ariz. 157, ¶ 8, 367 P.3d 61, 64 (2016), *quoting State v. Amaral*, 239 Ariz. 217, ¶ 11, 368 P.3d 925, 928 (2016) (alteration in *Kolmann*) (emphasis omitted). Thus, "[i]f the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal." *Id.*, *quoting Amaral*, 239 Ariz. 217, ¶ 11, 368 P.3d at 928. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68, *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶6 Hall first argues the trial court erroneously failed to consider the allegations in his petition and affidavits as true before finding he had failed to state a colorable claim of ineffective assistance of counsel. We disagree. In its order, the trial court specifically addressed the facts alleged as to each claim as if undisputed, and it then explained why those facts are insufficient to state a colorable claim of ineffective assistance of counsel.

¶7 Hall also relies on *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), to argue an allegation that "trial counsel's uninformed advice . . . [causing] a defendant to reject a plea . . . provides a colorable claim, in and of itself, for purposes of post-conviction relief." But in *Donald*, this court stated, "To mandate an evidentiary hearing, the defendant's challenge must consist of more than conclusory assertions and be supported by more than regret." *Id.* ¶ 21. There, the defendant alleged counsel had performed deficiently by failing to appreciate or convey the difference between his sentence exposure after trial and the sentencing range proposed in a plea offer, and he supported his claim with a transcript of court proceedings and his sworn statement that, had counsel adequately explained the offer, he would have accepted it. *Id.* ¶¶ 18, 22. The court concluded his "sworn assertions and supporting documents set forth a colorable claim that his counsel provided deficient advice regarding the plea agreement and the consequences of conviction," as well as a colorable claim of prejudice. *Id.* ¶¶ 19, 22.

¶8 Here, in contrast, Hall does not allege any such failure by counsel. Nor does he allege that counsel performed deficiently because of a misapprehension of applicable law. *Cf. State v. Ysea*, 191 Ariz. 372, ¶ 16, 956 P.2d 499, 504 (1998) (counsel performed deficiently "because he should have known or discovered the dispositive law" relevant to consequences of conviction). Instead, in essence, Hall asserts counsel's assessment of his probable success at trial turned out to be mistaken. He provided no affidavits or other evidence suggesting counsel's assessment of his case fell below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."). Nor has he identified any authority suggesting counsel's alleged statement that she "believed that she could win" at trial constitutes ineffective assistance.

¶9 Moreover, as the trial court pointed out, Hall has not even alleged, as the defendant in *Donald* had, that but for counsel's alleged deficiency, he would not have pleaded guilty. *See Donald*, 198 Ariz. 406, ¶ 22, 10 P.3d at 1201. With respect to this claim, the

trial court did not abuse its discretion in concluding Hall failed to rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, and failed to state a colorable claim of prejudice.

¶10 With respect to Hall's other claims, the trial court explained in detail its conclusions that he did not suffer prejudice from counsel's alleged errors and omissions and that, had counsel performed differently, it "would not have changed the outcome of the proceedings." *See Strickland*, 466 U.S. at 697 (recognizing ineffective assistance claims may be resolved "on the ground of lack of sufficient prejudice"). On review, Hall argues "the wrong standard was used" by the court "in determining whether the petition should have been summarily dismissed or a hearing should have been granted." Relying on *State v. Fillmore*, 187 Ariz. 174, 182, 927 P.2d 1303, 1311 (App. 1996), he maintains the court "prematurely" held him to a burden of proof required at an evidentiary hearing, "rather than determining whether, in fact, a colorable claim was presented." According to Hall, "[his] 'burden' was to state a colorable claim, not prove prejudice, which would have been shown at a hearing on the claim."[1]

---

[1]Hall relies on *United States v. Butts*, 630 F. Supp. 1145, 1148 (D. Me. 1986), to argue "prejudice can be presumed" from counsel's alleged interference with his right to testify. But this does not appear to be the "prevailing view." *State v. Arguelles*, 921 P.2d 439, 442 (Utah 1996) ("*Butts* . . . appears to be the only case in which a court applying the federal standard for ineffectiveness has imposed a per se rule of reversal when a defendant is prevented from testifying by his trial counsel."); *see also Palmer v. Hendricks*, 592 F.3d 386, 397 (3d Cir. 2010) (collecting cases; ineffective assistance related to defendant's right to testify addressed "under *Strickland's* two-prong framework, which requires the petitioner to 'show that [the deficient conduct] actually had an adverse effect on the defense'"), *quoting Strickland*, 466 U.S. at 693 (alteration in *Palmer*). Similarly, Hall fails to develop or support his assertion that a juror's recognizing and mentioning to other jurors that she had been acquainted with one of the witnesses years before trial "requires that prejudice be presumed."

¶11 In its order, the trial court correctly identified the prejudice a defendant must prove in order to prevail on an ineffective assistance claim, quoting *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). A defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, *quoting Strickland*, 466 U.S. at 694.

¶12 In addressing Hall's individual claims, however, the trial court stated, "For [Hall] to prove prejudice he must prove that the outcome of the trial would have been different had counsel not acted as she did." This is not the correct standard for resolving a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 693 (to prevail on ineffective assistance claim, "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *see also State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984) ("A 'reasonable probability' is less than 'more likely than not' but more than a mere possibility."). But Hall was required to "offer some demonstration that the attorney's representation fell below that of the prevailing objective standards . . . [and] some evidence of a reasonable probability that, but for counsel's unprofessional errors, the outcome of the [proceeding] would have been different." *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999); *see also* Ariz. R. Crim. P. 32.5 (requiring, as attachments to petition, "[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations").

¶13 The court did not simply find Hall failed to meet his burden of showing prejudice. Instead, after extensive analysis of the alleged errors in the context of the "totality of the evidence before the . . . jury," *Strickland*, 466 U.S. at 695, the court affirmatively concluded that, had counsel performed as Hall argues she should have, "it would not have changed the outcome of the proceedings."[2]

[2]Hall has not meaningfully challenged the trial court's specific findings regarding prejudice, and we find it unnecessary to repeat

Those findings necessarily preclude any "reasonable probability" of a different result, and so are consistent with the court's determination that Hall's claims of ineffective assistance of counsel, considered alone and cumulatively, were not "colorable." *See Strickland*, 466 U.S. at 699-700 (finding question of prejudice "resolvable" on basis of petition; state courts properly dismissed claim without hearing). We thus reject Hall's contention that he was entitled to an evidentiary hearing in order to "prove prejudice." *Cf. State v. Borbon*, 146 Ariz. 392, 399-400, 706 P.2d 718, 725–26 (1985) (request for hearing "so that trial counsel can fully explain" conduct found "insufficient to raise a colorable claim"; court not required "to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims"); *see also Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201 (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"); *cf. Palmer*, 592 F.3d at 396 (defendant's "mere assertion" that he would have testified about "self-defense," but for counsel's interference with right to testify, did not "raise a plausible showing of [*Strickland*] prejudice sufficient to warrant an evidentiary hearing" in federal habeas case).

¶14 Hall has failed to establish the trial court abused its discretion in summarily dismissing his petition for post-conviction relief. Accordingly, although we grant review, we deny relief.

---

the trial court's detailed analysis here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).